Supreme Court, U.S.
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No. 92-1090

In the Supreme Court of the United States

OCTOBER TERM, 1992

SIDNEY P. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entrapped as a matter of law.

2. Whether the government violated regulations of the Department of Health and Human Services or the Department of the Army in offering petitioner an opportunity to engage in drug trafficking.

3. Whether the government engaged in outrageous conduct.

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OPINIONS BELOW

The opinion of the Court of Military Appeals on reconsideration, Pet. App. 1a-31a, is reported at 35 M.J. 417. That court's initial opinion, Pet. App. 1b-16b, is reported at 33 M.J. 356. The opinion of the Army Court of Military Review, Pet. App. 1c-2c, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals on reconsideration was entered on September 30, 1992. The petition for a writ of certiorari was filed on December 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort McNair in Washington, D.C. Petitioner was convicted of distribution of cocaine in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. He was sentenced to confinement for five years and a dishonorable discharge. The convening authority approved the findings and sentence.[1] The Army Court of Military Review affirmed the findings and sentence. Upon discretionary review, the Court of Military Appeals affirmed in an initial opinion and again on reconsideration.

1. In the fall of 1988, agents of the Army Criminal Investigation Division (CID) suspected that a drug distribution ring was operating within the CID's headquarters in Falls Church, Virginia. Pet. App. 2a. On November 30, 1988, Rodney Powell became a "registered source" for the CID and named five or six individuals who (according to Powell) had sold drugs within CID headquarters. *Id.* at 2a, 2b. Petitioner was one of the persons named by Powell. *Id.* at 2a.[2] At the time, petitioner was a recovering drug addict enrolled in the Army Alcohol and Drug Abuse

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[1] The "convening authority" is the commander who convenes the court-martial. The convening authority selects the court-martial members (who are analogous to jurors), directs that the accused be tried by the court-martial for the charged offenses, and conducts a post-trial review of the proceedings.

[2] Powell later testified at trial that he and petitioner had used cocaine together, but that he had no prior knowledge that petitioner previously had sold drugs. Pet. App. 14b-15b.

Prevention and Control Program (ADAPCP). *Id.* at 2b.

On December 2, 1988, Powell called petitioner at the CID's request and asked petitioner if he could obtain drugs.[3] Pet. App. 3a. Powell told petitioner that he knew someone who had money and wanted to sell drugs, but did not know where to obtain drugs to sell. *Id.* at 3b. Petitioner agreed to help Powell obtain drugs. *Id.* at 3a. Later that day, as arranged, Powell and a CID agent (posing as the would-be seller) met petitioner at a convenience store in Falls Church. *Ibid.* Petitioner led them to a crack house in Washington, D.C. *Id.* at 3a, 3b. En route to the crack house, petitioner told the CID agent that he had sold drugs while stationed in Panama, and he explained how to manufacture powdered cocaine into crack cocaine. *Id.* at 3a. During the ride, petitioner said that he was currently in a drug rehabilitation program. *Ibid.*

Upon arriving at the crack house, petitioner entered the building and purchased cocaine while Powell and the CID agent waited in the car. Pet. App. 3a-4a, 3b. Petitioner returned with cocaine, saying that he had made "a 'good deal' and would do it again if they needed more." *Id.* at 4a.

On December 5, 1988, Powell again contacted petitioner, and they agreed to another sale using the same procedure. Pet. App. 4a, 3b. Petitioner, Powell, and the CID agent drove to the same crack house as

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[3] The CID agent testified that only one phone call was made to petitioner by Powell. Tr. 111-112. While that fact was disputed, all credibility inferences must be drawn in favor of the verdict. Pet. App. 18a n.6.

on December 2. *Id.* at 4a. Petitioner entered the building, purchased cocaine, and returned to the car. *Id.* at 4a. Petitioner again indicated that he had gotten "a good deal" and asked to be compensated for his services. *Id.* at 4a-5a. Petitioner also said he could do it again, but would have to do so before his wife visited him in a few days. *Id.* at 4a.[4]

2. At trial, petitioner admitted his role in the distribution of drugs. Pet. App. 3b. He contended, however, that he had been entrapped, that the government had violated regulations of the Department of Health and Human Services (HHS) and the Department of the Army, and that the government had engaged in outrageous conduct. *Id.* at 3b-4b. The convening authority denied petitioner's motion for dismissal. At trial, the judge instructed the members of the court-martial panel on the entrapment defense. Tr. 55. The court-martial panel, however, rejected petitioner's claim and found him guilty of distributing cocaine. *Id.* at 4b.

3. The Court of Military Appeals, then a three-judge court, affirmed in a 2-1 decision. Pet. App. 1b-16b.[5] The court found that petitioner was not entrapped as a matter of law. *Id.* at 7b-8b. The court also found that the government had not violated HHS or Army regulations, nor had the government

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[4] On January 17, 1989, the CID agent contacted petitioner to arrange a third purchase of cocaine. Tr. 128. The agent testified that petitioner agreed to another sale. *Ibid.* The deal was never completed, however, because of concern that Powell might tell petitioner about the status of the CID agent. Tr. 129.

[5] The Army Court of Military Review previously had affirmed in a brief per curiam decision. Pet. App. 1c-2c.

engaged in outrageous conduct. *Id.* at 4b-7b, 8b-11b. Senior Judge Everett dissented. *Id.* at 11b-16b. He concluded that the government had violated its regulations, entitling petitioner to dismissal of the charges. *Id.* at 12b-16b.

4. In an opinion on reconsideration after Senior Judge Everett's retirement, a newly expanded Court of Military Appeals affirmed in a 3-2 decision. Pet. App. 1a-31a. The court found that the government had carried its burden of proving beyond a reasonable doubt that petitioner was predisposed to commit the crime and therefore was not entrapped. *Id.* at 2a, 16a-19a. The court concluded that the government did not violate HHS or Army regulations and that, even assuming the regulations had been violated, petitioner was not entitled to dismissal of the charges. *Id.* at 7a-16a. The court also held that the government's conduct was not outrageous. *Id.* at 19a.[6]

Judges Gierke and Wiss dissented. Pet. App. 21a-31a. They concluded that the government had violated the applicable regulations, which warranted dismissal of the charges. *Id.* at 24a-26a. They also concluded that petitioner had been entrapped. *Id.* at 26a-31a.

ARGUMENT

1. Petitioner contends that he was entrapped. Pet. 21-27. The courts below and the members of the court-martial correctly found that petitioner was predisposed to commit the crime and therefore was not entrapped.

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[6] Judge Cox and Chief Judge Sullivan wrote brief concurring opinions. Pet. App. 19a-21a.

The predisposition requirement is designed to eliminate the entrapment defense for those defendants who would have committed the crime anyway, even absent inducement by the government. See *United States* v. *Russell*, 411 U.S. 423, 434 (1973); see Rule for Courts-Martial 916(g) ("It is a defense that * * * the accused had no predisposition to commit the offense."). It is "a state of mind which readily responds to the opportunity furnished by the officer or his agent to commit the forbidden act for which the accused is charged." *United States* v. *Burkley*, 591 F.2d 903, 913-916 (D.C. Cir. 1978).

As the courts below and the members of the court-martial correctly determined, the evidence presented at trial revealed that petitioner was ready and willing to commit the crime. When Powell first called, petitioner agreed to help him obtain drugs.[7] Petitioner met Powell and the CID agent later that day, led them to a crack house in Washington, purchased cocaine, and gave the cocaine to the CID agent. As this Court has stated, such readiness to commit crime establishes the defendant's predisposition: "[A]n agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs, and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate 'sting' operation involving government-

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[7] The CID agent testified that Powell called petitioner only once. While there was testimony that there was more than one call, the testimony of the CID agent must, of course, be accepted on appellate review of the verdict. Pet. App. 18a n.6. See *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (the evidence must be viewed in the light most favorable to the government).

sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition." *Jacobson* v. *United States*, 112 S. Ct. 1535, 1541 (1992).

In this case there also was further evidence of petitioner's predisposition. "There was evidence that [petitioner] had used and sold cocaine in the past. In fact, he bragged about the ability to make crack from powdered cocaine." Pet. App. 18a. Furthermore, "at least on one occasion, [petitioner] indicated that he would like his profit and showed his willingness to buy other drugs for the government agent anytime before his wife's arrival." *Id.* at 19a. In sum, the evidence amply supports the conclusion of the courts below and the court-martial panel members that petitioner was predisposed and therefore was not entrapped.

Petitioner's reliance on *Jacobson* and *Sherman* v. *United States*, 356 U.S. 369 (1958), is misplaced. In *Jacobson*, the defendant committed the crime only after "26 months of repeated mailings and communications from Government agents and fictitious organizations" attempting to convince him to purchase child pornography. 112 S. Ct. at 1541. In *Sherman*, the government agent repeatedly and unsuccessfully coaxed the defendant to buy drugs, ultimately succeeding only by playing on the defendant's sympathy for a fellow drug addict suffering the pangs of withdrawal. By contrast, in this case petitioner readily agreed to commit a crime and did so the very day it was proposed. Compare *Sorrells* v. *United States*, 287 U.S. 435, 441 (1932) ("agent lured defen-

dant, otherwise innocent, to [crime's] commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War."). Furthermore, unlike in *Sherman*, Powell told petitioner that he wanted drugs for distribution and profit, not for his own personal use to alleviate the physical suffering of drug withdrawal. Powell therefore did not play on petitioner's sympathy for a fellow recovering addict. See *United States* v. *Ventura*, 936 F.2d 1228, 1230-1231 n.13 (11th Cir. 1991).

2. Petitioner contends that the government violated HHS and Army regulations, thus requiring dismissal of the charges against him. Pet. 27-32. That contention is without merit.

a. The courts below correctly found that the government's conduct did not violate any agency regulations.

To encourage participation in drug rehabilitation programs, HHS and the Army have adopted regulations regarding the confidentiality of information provided by the participants in such programs. See 42 C.F.R. 2.17; Army Reg. 600-85 (1988); Army Reg. 195-2 (1985); Army Criminal Investigation Division Reg. 195-15 (1987). Those regulations "proscribe placement of informants in these programs, and use of information gathered by informants or undercover agents against the patients of such a program." Pet. App. 10a, 10b. But "these regulations cannot be reasonably construed to give patients immunity for post-entry drug offenses observed and participated in by government agents or informants." *Id.* at 10a, 10b. Indeed, petitioner concedes that "[t]he statutory and

regulatory provisions do not specifically address undercover sting operations, or, for that matter, most other aspects or techniques of law enforcement." Pet. 31. The regulations thus protect participants from suffering adverse consequences as a result of the information they provide during their participation in the program, but the regulations do not protect participants (such as petitioner) from suffering the consequences of their continued participation in illegal drug trafficking activities.

Petitioner's suggestion that the regulations create an all-encompassing immunity and prohibit all covert activities against ADAPCP participants would create a safe haven for drug dealers. Of course, "[i]t is not the purpose of drug rehabilitation programs to provide a safe harbor for those who continue to engage freely and voluntarily in subsequent criminal activity." Pet. App. 6b-7b. Such a holding would also thwart the efforts of law enforcement authorities who, in good faith, are trying to uphold the law through covert drug operations.

Even if petitioner were correct that the regulations bar CID agents from offering a *known* ADAPCP participant an opportunity to partake in drug trafficking, Pet. 31, government informant Powell did not know that petitioner was in drug rehabilitation "*at the time* [*petitioner*] *was approached.*" Pet. App. 21a (Cox, J., concurring). Thus, even under petitioner's interpretation of the regulations, the sting operation here did not violate the regulations, because petitioner "clearly was not targeted as a result of being in the program." *Ibid.*

b. In any event, even assuming the regulations were violated, petitioner cites no support for his

contention that the charges against him should be dismissed as a result. See Pet. App. 10a. The regulations themselves do not provide such a remedy. Moreover, this Court has been unwilling to remedy an agency's violations of regulations by excluding evidence obtained in violation of the regulations or by dismissing the prosecution altogether. See, *e.g.*, *United States* v. *Caceres*, 440 U.S. 741, 755, 757 (1979); cf. *United States* v. *Payner*, 447 U.S. 727, 737 (1980) (Burger, C.J., concurring) ("Orderly government under our system of separate powers calls for internal self-restraint and discipline in each Branch; this Court has no general supervisory authority over operations of the Executive Branch, as it has with respect to the federal courts."); Pet. App. 20a (Cox, J., concurring) ("If the Secretary believes that law enforcement personnel are mucking up his program, the Secretary can fix that, and he can certainly inhibit prosecutions in derogation of his regulations."). In the context of a criminal prosecution, the courts are not the proper authority to establish such remedies for an agency's violations of its own regulations governing the investigation and prosecution of crime. Cf. *United States* v. *Simpson*, 927 F.2d 1088 (9th Cir. 1991); *United States* v. *Miller*, 891 F.2d 1265, 1271 (7th Cir. 1989) (Easterbrook, J., concurring) ("When push comes to shove, we should reject the contention that the criminal must go free because the constable was too zealous."). "There are a variety of tools available to the Executive Branch to determine * * * what action should be taken against those violating the regulations." Pet. App. 16a.

As a practical matter, if petitioner's argument were correct, defendants would be entitled to automatic

dismissal any time an agency violated its regulations during the investigation or prosecution of criminal activity. Such a rule of automatic dismissal would cause executive agencies to promulgate fewer rules governing the conduct of its agents. That would not be a beneficial result, as this Court noted in *Caceres*: "In the long run, it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration of the kind displayed by this record, than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form." 440 U.S. at 756.

3. Petitioner claims that the government engaged in outrageous conduct, requiring dismissal of the charges against him. Pet. 33-37.

The courts of appeals have repeatedly stated that they would find that the government has engaged in outrageous conduct only in "the rarest and most outrageous circumstances," *United States* v. *Garrett*, 716 F.2d 257, 275 (5th Cir. 1983), cert. denied, 466 U.S. 937 (1984)—where the government's conduct is "truly outrageous," *United States* v. *Miller*, 891 F.2d 1265, 1267 (7th Cir. 1989), and "shocking to the universal sense of justice," *United States* v. *Russell*, 411 U.S. 423, 432 (1973). See *Hampton* v. *United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring) ("Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to contraband offenses, which are so difficult to detect in the absence of undercover Government involvement."). The courts below correctly determined that this is not such a case.

The investigating agents had a reasonable suspicion based on information from informant Powell (not from petitioner's participation in drug rehabilitation) that petitioner was involved in drug trafficking.[8] The government then offered petitioner the opportunity to participate in drug trafficking, and petitioner enthusiastically responded. The government's conduct was not inappropriate at all, much less "truly outrageous." Cf. *Jacobson*, 112 S. Ct. at 1540 ("[T]here can be no dispute that the Government may use undercover agents to enforce the law. * * * Artifice and stratagem may be employed to catch those engaged in criminal enterprises.") (internal quotation marks omitted).

Moreover, contrary to petitioner's assertion, the government did not "[induce] a recovering drug addict to distribute drugs and thus throw away his hard-won sobriety." Pet. 21. "If the government informant had preyed on [petitioner's] addiction to induce him to commit the crime of *using cocaine*," petitioner might be able to maintain an outrageous government conduct claim. Pet. App. 10b (Sullivan, C.J., concurring).

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[8] Although the CID had a reasonable suspicion regarding petitioner, the government need not have reasonable suspicion of criminal activity before beginning an undercover investigation of an individual. See, *e.g.*, *United States* v. *Allibhai*, 939 F.2d 244, 248-249 (5th Cir. 1991), cert. denied, 112 S. Ct. 967 (1992); *United States* v. *Chin*, 934 F.2d 393 (2d Cir. 1991); *United States* v. *Luttrell*, 923 F.2d 764 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1558 (1992); *United States* v. *Jenrette*, 744 F.2d 817, 824 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985); *United States* v. *Gamble*, 737 F.2d 853, 860 (10th Cir. 1984); *United States* v. *Jannotti*, 673 F.2d 578, 608-609 (3d Cir.), cert. denied, 457 U.S. 1106 (1982).

But, as the court below observed, an appeal was not made to petitioner's addiction, but rather to his greed and willingness to engage in and profit from the illegal drug traffic to others, Pet. App. 5a-6a:

> [T]his is not a case in which an alcoholic is given alcohol to drink or a cocaine user is given cocaine to use. Instead, this is an instance in which an individual who had sold cocaine in the past was willing to become a distributor for profit, a merchant in the spread of human misery that is this country's drug epidemic.

See also *United States* v. *Smith*, 924 F.2d 889, 898 (9th Cir. 1991); *United States* v. *Ford*, 918 F.2d 1343 (8th Cir. 1990).

In any event, this Court has never held that the Due Process Clause requires dismissal of the charges against a defendant in a case of outrageous government conduct. See, *e.g.*, *United States* v. *Payner*, 447 U.S. at 737 n.9; *Hampton* v. *United States*, 425 U.S. 484, 488-491 (1976) (plurality opinion); *United States* v. *Russell*, 411 U.S. at 431-432. Since the government did not attempt to exploit petitioner's weaknesses—other than his willingness to commit drug trafficking crimes—the government cannot fairly be said to have engaged in outrageous conduct in this case. See, *e.g.*, *United States* v. *Smith*, 924 F.2d at 898; *United States* v. *Ford*, 918 F.2d at 1349.[9]

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[9] As the Eighth Circuit explained in *United States* v. *Ford*, 918 F.2d at 1349: "Were we to accept Ford's argument, we would prevent the government from making the accommodations needed to function effectively in the drug culture. Furthermore, we would provide drug dealers with an easy means for determining whether a potential drug buyer is an

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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undercover agent. For example, if we prevent undercover officers from ever giving quantities of drugs to drug sellers who were also drug addicts, any dealer would easily be able to avoid arrest by informing potential purchasers of their addiction, real or phony, and asking for a sample of the drug. If the purchaser refuses, the dealer would likely conclude that the purchaser is a police officer, and refuse to sell the drugs. Thus, the efficacy of undercover operations would be greatly reduced and undercover agents would be seriously compromised."